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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

REPLY BRIEF OF PETITIONER.

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The award of $10,000 as costs was made utterly without power or authority in law and in disregard of the plain provisions of the governing statutes. It is in fact an unwarranted additional penalty imposed under the guise of costs.

Respondent has failed to answer petitioner's Points A and B. Instead, the principal contention of the respondent seems to be that an award of costs incidental to an order of the District Court does not make such order final or appealable. This is not invariably true as pointed out by Mr. Justice Taft in the case of *Newton* v. *Consolidated Gas Co.* (1923), 265 U. S. 78, at page 83, as follows:

> "When the power of the court to assess costs against either party is *not* in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. *But the rule*

is not absolute and should not be enforced when the trial court assumes the power to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. Thus, in *Trustees* v. *Greenough,* 105 U. S. 527, an appeal was allowed from a decree in equity solely for costs when the question was whether they could be properly paid out of a fund in the control of the court. So in *In Re Michigan Central R. R. Co.,* 124 Fed. 727, an intervener was allowed to appeal from a decree of a trial court, allowing costs in favor of the clerk, *when it was objected that neither by statute nor general law could such costs be allowed by the court in favor of the clerk.* The question is fully considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion by Judge Lurton, afterwards Mr. Justice Lurton, of this court. *The many cases cited in which appeals from decrees for costs had been denied were distinguished as involving a question not of positive law, but of discretion.* We think the distinction made in that case a sound one, and that, as the question is here presented, the appeal is a proper one." (Italics ours.)

It will be noted that this Court has held an order to be reviewable by an appellate court, "when the trial court assumes the power to assess as costs against a party expenditures of a class not legally assessable as such"; and that such question is a question of "positive law". This is precisely the situation in the case at bar.

The respondent at page 6 of its brief, as well as in its counsel's affidavit submitted to the District Court on the settlement of the order punishing for contempt (R. 41), contends that the sum of $10,000

is properly assessed by virtue of Section 803(1) of the New York Civil Practice Act (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1276) (Appendix, *infra,* p. 13). That section is wholly inapplicable. The section applicable to a contempt in proceedings supplementary to judgment is definitely fixed by the Act itself (Section 801).

Section 801 of the New York Civil Practice Act (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1275) (Appendix, *infra,* p. 13), specifically provides for the punishment for disobedience of an order or a subpoena, in proceedings supplementary to judgment. It provides that the punishment for contempt in this case is governed by Section 753 and Section 773 of the Judiciary Law (Laws of New York, 1909, Ch. 35, Secs. 753, 773, pp. 357, 395) (Appendix, *infra,* pp. 13-14).

> *Williamson* v. *Drogaris, et al.* (not officially reported), 288 N. Y. Supp. 179 (App. Div. 1936);
>
> *Consumer's Poultry Dealers Corporation* v. *Podberesky Bros., Inc.,* 244 App. Div. 754 1935);
>
> *Weddle* v. *Grzeczezak,* 189 App. Div. 493 (1919).

The *only* costs allowed by the statute on a motion for contempt are costs and disbursements of such a motion (Sec. 773 of the Judiciary Law). The case of *Burton* v. *Jurgensen,* 138 N. Y. Misc. 69 (1930), is directly in point. The Court in that case, held as follows:

> "Under the provisions of the Judiciary Law, I adjudge the defendant Henry Jurgensen in contempt of court, and, under the authority of sec-

> tion 773, will impose upon him a fine of the amount of the judgment with interest to the date of the order and in addition fifty dollars and *the actual disbursements paid by the plaintiff on account of this proceeding*" (p. 72). (Italics ours.)

Likewise, the respondent, in its brief, at pages 4 and 5, quotes from the case of *Doyle* v. *London Guarantee & Accident Company, Limited* (1907), 204 U. S. 599, as follows:

> "if they produce the cash book alone, they are ordered to pay no more than the *costs accruing upon this motion,* including the stenographer's charges on or before January 20th, or in default of such payment, to be imprisoned for 60 days" (204 U. S. at p. 602). (Italics ours.)

It will be noted that the costs therein are costs "accruing upon this motion" which can only mean the motion to punish for contempt.

The fine and penalty to be imposed as provided by the judiciary law, are the actual damages referable to non-compliance with the process of the Court or a fine of $250 together with costs and necessary disbursements. The costs of a motion in New York State are fixed by the Civil Practice Act, Section 1505 (Laws of New York, 1932, Ch. 260, §1, p. 641) (Appendix, *infra,* p. 14) amounting to $10. Therefore it will be seen that the allowance of $10,000 under the guise of costs, is a penalty wholly unauthorized by any law or statute.

The affidavit of counsel for the respondent enumerates the items upon which it predicates its demand for costs. It reads as follows:

> "To recapitulate, the fair and reasonable value

of services and the disbursements paid out or incurred to date are:

Attorneys services in supplementary proceedings	$ 7,675.00
Stenographic cost	570.80
Attorneys services in New Jersey action on judgment	725.00
Attorneys services in Nassau County action to set aside transfer of real estate	100.00
Disbursements in connection with the foregoing	3,049.20
	$12,120.00

"In view of the foregoing facts, it is submitted that an allowance of costs in the maximum amount (5% of the unpaid balance of the judgment, which would amount to $11,754.10 in this case) allowed by statute, in addition to the fine in the full amount of the judgment, *is small punishment indeed* for the contempt of Court of which the judgment-debtor has been found guilty" (R. 48). (Italics ours.)

It will be seen that not one of the items enumerated in this recapitulation are assessable as costs in this proceeding, and *there is no statute or general law which permits a court to fine a delinquent five per centum of the amount of the unpaid balance of a judgment as costs.*

The body of the affidavit enumerates thirty-one separate items of attorneys' services, claimed to be of the value of $7,675 (R. 41, 46). Only seven of these items could have been properly charged as costs on the motion to punish for contempt (R. 43-46) and these seven items constitute only minor items of services directly referable to the alleged contempt itself. No attempt

was made to give an estimate of their value. They were merely grouped among the thirty-one items for which the sum of $7,675 is demanded.

The affidavit of respondent's attorney (R. 34-30) shows that the respondent's attorneys attempted to collect as costs, not only costs of the motion to punish for contempt, but costs, disbursements and attorneys' fees in connection with the entire supplementary proceedings to date, and costs, disbursements and attorneys' fees in connection with an action on the judgment, instituted in the State of New Jersey, and costs, disbursements and attorneys' fees in an action in the Supreme Court of the State of New York, Nassau County, to set aside a transfer of real estate. By no stretch of the imagination could these items be held to be costs. And in no way could detective services in the months of December, 1935 and January, 1936 (R. 50) be charged as disbursements on the motion to punish for contempt, which motion was instituted by order to show cause dated November 1, 1935 (R. 34), and served upon petitioner on November 9, 1935 (R. 3).

In fact, the sum of $10,000 ordered to be paid does not constitute costs at all. It is a mere euphonism to describe it as costs.

The authority to impose costs under Section 803 is found in Section 802(4) (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1276), which reads as follows:

> "The court may impose costs as provided in section eight hundred and three of this article."

An examination of Section 802 (see Appendix, Brief of Petitioner, pp. 48, 49) clearly establishes that the costs allowed under Section 803 are costs to be awarded at the final determination of the proceedings

as provided for in Section 802, and have nothing whatever to do with contempts.

Thus, even a cursory examination of the items clearly demonstrates that the District Court could only have awarded the sum of $10,000 as costs under the erroneous impression that the statutory authority of Section 803 of the New York Civil Practice Act was applicable, and such surely is not the case.

Therefore, it will be seen that the District Court had absolutely no authority to award as costs five per cent. of the judgment or any per cent. thereof. Certainly, the sum of $10,000 is explicable only on the theory upon which it was demanded. In the language of the affidavit, the imposition of five per cent. of the judgment as costs is "small punishment indeed for the alleged contempt" (R. 48). *That is an additional penalty, wholly unauthorized by any law.*

Nowhere is there a word in these papers showing the reasonable value of services in the contempt proceeding, nor was the allowance made on the theory that Section 773 of the Judiciary Law was applicable. The allowance was claimed, demanded and granted on the fallacious theory that the Court had the power to add up to five per centum of the judgment as costs regardless of the services that may have been performed in the contempt proceeding and regardless of the value of said services. Viewed in that light, it will be seen that *this is an adjudication as a penalty wholly outside the court's power and calling it or labeling it "costs" does not change its true nature.*

The respondent contends that if an appeal should be heard by the Circuit Court of Appeals and if the determination of that court were in favor of the respondent, the petitioner would have a second oppor-

tunity to test the jurisdiction of the District Court by writ of *habeas corpus,* when and if he be arrested. There are two answers to that proposition. In the first place granting that the Circuit Court of Appeals, in the event of an arrest, could review the orders by writ of habeas corpus, such a possibility cannot deprive that court of its jurisdiction to review the orders herein. In the second place, it seems implausible that present day procedure should demand that one suffer the indignity of being incarcerated in order to test the District Court's jurisdiction over his person if an appeal would accomplish the same result without the unnecessary accompanying humiliation.

Is it not more in consonance with our modern method of procedure that the invalidity of an order should be tested by appeal, and not by disobedience as counsel for the respondent suggests? Clearly proceeding by appeal is not only correct, but also more in agreement with our present day practice.

The petitioner has not extended his argument beyond the scope of the writ of certiorari.

The respondent's second contention, at page 8 of its brief, expresses a belief that the petitioner has attempted to circumvent the order of this Court which granted certiorari, dated May 18, 1936 (R. 97). That criticism necessarily invites petitioner to show that the claim of lack of power of the District Court is a substantial, solid claim, fortified by an imposing line of authority, and the precise language of the statutes. The material in the petitioner's brief on this point does not invite a decision by this Court on the merits of the controversy, but merely shows the substantial

character of the controversy, and thus within the doctrine of *Phillips* v. *Negley,* 117 U. S. 665, *The Farmers Loan and Trust Co., Petitioner,* 129 U. S. 206, and *City of Eau Claire* v. *Payson,* 107 Fed. 552, the petitioner is justified in bringing in the matter criticized by the respondent. This was no "ingenious device" to secure a review by this Court as to the basic controversy. Such a statement is utterly without foundation. What the petitioner has done is merely to set forth all the matters the petitioner believes necessary and material to aid this Court in reaching the conclusion that the Circuit Court of Appeals has jurisdiction to entertain the petitioner's appeal, and nothing more.

The petitioner here is in the same position as the petitioner in *The Farmers Loan and Trust Company, Petitioner,* 129 U. S. 206, in which this Court granted a writ of mandamus to allow an appeal from an order which determined the rights of parties in a receivership. The last lines of the quotation from this Court's opinion, found at page 16 of the petitioner's brief, read as follows:

> *"In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal"* (129 U. S. 206, 216). (Italics ours.)

The petitioner is praying that this Court merely order the Circuit Court of Appeals to determine whether or not the District Court had the requisite power to render the orders herein. And just as the question of power was raised in *The Farmers Loan and Trust Co., Petitioner,* case (*supra*), it became incumbent upon the petitioner herein to raise the question of power in this case.

At page 9 of respondent's brief, is found a number of cases showing that orders denying motions to dismiss a proceeding or to quash service of process for want of jurisdiction over the person of the defendant are not appealable. In those cases, a trial and judgment follow the denial of the motion, and the jurisdictional point is reserved and may be raised on appeal after judgment is entered. With that the petitioner has no quarrel; but wherein will there be any judgment in this proceeding?

The termination of proceedings supplementary to judgment in this case is governed by Section 802 of the New York Civil Practice Act. To await the outcome of the proceedings pursuant to Section 802, as suggested by respondent, would put the petitioner in a situation in which, as set forth in Point A, there would be no adequate relief without recourse to an appeal at this time, as in the receivership cases therein discussed.

At page 13 of respondent's brief, is a discussion of the cases of *Doyle* v. *London Guarantee & Accident Co., Limited* (1907), 204 U. S. 599 and *Matter of Christensen Engineering Co.* (1904), 194 U. S. 458. As to these cases, petitioner reiterates that the distinguishing feature in the instant proceeding is that there will be no judgment from which an appeal can be taken. All the Court may order is a termination of the proceeding without any adjudication although the testimony taken may be used at any time in appropriate applications. The point is that there may be no final decision in proceedings supplementary to judgment.

Section 802 of the Civil Practice Act (see Appendix, Brief of Petitioner, p. 49) provides not only

for termination by consent or order of the court, but also that the proceeding shall be deemed closed automatically two years from the date of the service of the subpoena, unless the court shall make an affirmative order extending the proceeding for a definite period.

It will thus be seen that no reviewable order, decision or decree of the court may ever be made. This is the capital distinction between merely intermediate orders punishing for contempt, as in the *Doyle* case (*supra*) wherein the case could be tried and judgment rendered, from which an appeal could be taken, and the instant proceeding.

Thus, there is no parallel between the *Doyle* case which involved an examination of books before trial in an action of *assumpsit* and proceedings supplementary to judgment which may be terminated without the entry of any decision.

As to the cases of *Steinman* v. *Conlon* (1913), 208 N. Y. 198 and *Hand* v. *Ortschreib Building Corporation* (1930), 254 N. Y. 15, merely a word is necessary. There is a great distinction between Section 588(5) of the New York Civil Practice Act, and Section 225 of Title 28, United States Code, both as to the words employed and the judicial interpretations thereof. It is enough to say that the jurisdiction of the Circuit Court of Appeals has been definitely settled by a long line of controlling authority as shown in Point A of petitioner's brief. The limitations in the jurisdiction of the Court of Appeals can have no bearing upon this inquiry.

Furthermore, the Court of Appeals of the State of New York is fully justified in its decisions in the *Steinman* and *Hand* cases (*supra*) because a review

by the Court of Appeals would mean a second appellate review, as the appeals were from orders of the Appellate Division of the Supreme Court, whereas the petitioner in the instant proceeding is seeking but a first review by an appellate court; that is, the Circuit Court of Appeals.

At page 15 of the respondent's brief, the argument under Point III is emphasized by this language:

> "If the mere existence of a contention by an appellant that the lower court has exceeded its jurisdiction makes an interlocutory order appealable, then the order in this case was appealable and Respondent will make a proper answer on the merits in the Circuit Court of Appeals as it did in the District Court."

The answer to the respondent is that so far as the imposition of the costs is concerned, the order is definite, final and immediate, and, therefore, within the doctrine of innumerable cases considered in Points A and B of petitioner's brief. It is a *final order,* not interlocutory, as asserted. Secondly, if such final order, as contended, was made without power in the Court to make it, and if the imposition of a penalty under the guise of costs without judicial or statutory authority is involved, then by classical precedent, it is reviewable.

Respectfully submitted,

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On the Brief.

Appendix.

The additional sections of **Article 45 of the New York Civil Practice Act** are, as follows:

"Sec. 801. *Punishment for disobedience of order or subpoena.* A person who refuses or without sufficient excuse neglects to obey an order or subpoena issued pursuant to any provision of this article and duly served upon him, or any order made or oral direction given directly to him, by a judge or referee, in the course of the special proceedings, or who violates the provisions of section seven hundred eighty-one endorsed upon the subpoena served upon him, may be punished for contempt, as provided in the judiciary law, by the court in which such proceeding is pending or by the judge who made such order or the court from which was issued the order or subpoena or before whom or which such order or subpoena was returnable."

"Sec. 803. *Costs.* 1. The court or judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witnesses' fees and other disbursements, including referee's fees, and of a sum in addition thereto not exceeding five per centum of the judgment but where such additional sum is under fifty dollars, the court may allow a sum not to exceed fifty dollars. The court may direct the payment thereof out of any money which has come or may come into the hands of the receiver or sheriff; or, within a time specified in the order, by the judgment debtor.

"2. * * *."

The applicable sections of the **Judiciary Law of the State of New York,** read, as follows:

"Sec. 753. *Contempts punishable civilly.* A

court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases: * * *

1. * * *; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge."

"Sec. 773. *Amount of fine.* If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section."

The applicable section of the **New York Civil Practice Act,** in reference to costs on a motion, is as follows:

"Sec. 1505. *Amount of costs upon a motion or reference.* Costs awarded to either party to an

action upon any motion, other than for a new trial upon a case or for judgment upon a special verdict, or upon a reference specified in section fourteen hundred and eighty-six of this act, to each party to whom costs are awarded, a sum fixed by the court or judge, not exceeding ten dollars, besides necessary disbursements for printing and referee's fees; except that upon appeal to the appellate division of the supreme court, costs may be awarded not exceeding fifty dollars besides necessary disbursements for printing."